LECTURE

AMERICAN CORRESPONDENCE SCHOOL OF LAW

LAW OF CONTRACTS

BY

JOHN D. LAWSON, LL. D.

Dean of the Law Department of the University of Missouri.

Author of "Principles of the American Law of Contracts."

AMERICAN CORRESPONDENCE SCHOOL OF LAW

CHICAGO, U. S. A.

RJF 21 Nov 67

John D. Lawson

Biographical Sketch

of

JOHN DAVISON LAWSON.

John Davison Lawson, Professor of Contract and International Law and Dean of the Law Department of the University of Missouri, was born and received his Academic and legal education in Canada. In 1876 he began the practice of law in Saint Louis. For several years he was Editor of the Central Law Journal, which continues today one of the leading periodicals of general circulation in the country.

He has been a Judge of a Civil Court and President of the Bar Association of Missouri. Since 1903 he has been Dean of the Law Department of the State University. He is widely known as a Legal Author. His works on Expert and Opinion Evidence; Presumptive Evidence; Rights, Remedies and Practice, and Usages and Customs are well known to the Profession generally and his Law of Contracts and Law of Bailments are used as text-books in a very large number of the Law Schools in the United States.

LAW OF CONTRACTS

Part I.

Making of Contract.

A CONTRACT is an Agreement, enforceable by law, between two or more parties, to do, or not to do, a certain act or thing.

An AGREEMENT is where two or more persons are of the same mind and intention concerning the subject matter.

Though the words CONTRACT and AGREEMENT are frequently used as meaning the same thing, I propose here to speak of CONTRACT as an *agreement enforceable by law,* i. e., the agreement which Courts will recognize and which will give legal rights to the parties concerned. Hence a CONTRACT is composed of agreement plus obligation,—by obligation being meant the duty imposed by the law upon the parties to act as they have agreed.

This Obligation depends on form, consideration, capacity, consent, and legality; for if one of these necessary elements be absent there is no contract. Therefore, it is proper to say that the elements of a contract are (1) Agreement, (2) Form and Consideration, (3) Capacity, (4) Consent, and (5) Legality.

Agreement.

Agreement is always the result of offer and acceptance. An offer is the expression of a person's willingness to become, according to the terms expressed, a party to an agreement. An offer in a contract may assume two forms. It may be—

(1) The offer of a promise: as for example, the offer of a reward for doing a certain act.

(2) The offer of an act: as for example, serving one in order to get wages.

Acceptance on the other hand is the expression of a person's willingness to do, or to abstain from doing, that which the person making the offer requires to be done or left undone, according to the terms set forth in the offer. Acceptance may assume three forms; viz.—

(a) Simple assent, either written or verbal.

(b) The giving of a promise: as for example, promising wages for services offered.

(c) The doing of an act: as for example, finding a lost dog, for the recovery of which the owner offers a reward.

The Offer must be communicated to the party to whom it is made and he on the other hand must communicate his acceptance to the offerer. An offer or an acceptance, or both, may be communicated,—

(1) By writing, or word of mouth, which constitute express offer or acceptance.

(2) By the conduct of the parties which constitutes implied offer or acceptance.

(3) Or partly by the one and partly by the other.

An offer which is not communicated to the other party is of no legal value. A man cannot be said to accept an offer of which he is in ignorance, nor can he be forced to accept and pay for services which he did not know were being rendered and which, therefore, he could not decline. As very well put by an old Judge, "I clean your property without your knowledge. Have I then a claim on you for payment? How can you help it? One cleans another's shoes, what can the other do but put them on? Is that evidence of a contract to pay

for the cleaning?" In the same way a mental acceptance not communicated by words or conduct is in the eye of the law no acceptance.

Contracts made through the post present some peculiar features. An offer made through the post is not communicated till it is actually received and read, but an acceptance is communicated to the writer of the letter when the accepting letter is dropped into the post office.

To the rule that acceptance must be communicated to the offerer there is one exception, viz: Where the offerer by the very terms of his offer has intimated that he wants the thing done and does not require the person to whom the offer is made to inform him first that he will do it. If I advertise that I will give anyone $5.00 to find and restore my dog, I do not expect people to notify me that they intend to hold me to my offer, and the agreement is complete when the dog is found and restored. So if I send to a merchant asking him to deliver me certain goods, he need not communicate his acceptance to me; all he is required to do to make the agreement complete is to send the goods.

The offer must refer to legal relations and must be of a serious character. Idle offers in jest or social engagements cannot be made the foundation of an agreement. So we must distinguish between real offers and mere requests that the public will come forward with offers to the person making the request. Thus, if I offer to sell A a particular thing or to reward anyone who will find my dog, there we have a definite proposal, but if I by advertisement or by circular state that I have one thousand cords of wool to sell at $4.00 a cord, this is never construed by the Courts as amounting to an offer which can be accepted by anyone who pleases, but is considered a mere invitation on my part for others

to make offers to me, which I may accept or reject at my pleasure.

The offer may be accepted only by the person to whom it is made. If an offer is made to A, B cannot get any rights by accepting it. General offers made to the public, as for example, offers of reward, may, however, be accepted by anyone.

The acceptor is bound only by the terms of the offer. If an offer, on the face of it, contains the terms of a complete contract, the acceptor will not be bound by any other terms intended to be included in it, unless he had knowledge of such other terms, or his attention was directed to them, and he was in a position to ascertain their nature. The principle is best illustrated by the cases decided on the validity of conditions printed on railroad tickets where it is decided that a company, having sold a ticket which contains on the face of it only the name of the stations of departure and arrival, without words calling attention to the conditions printed on the back, is liable to the full amount for the loss of the plaintiff's baggage through the fault of the company's servants, although conditions on the back of the ticket restricted the company's liability.

The acceptance must be absolute, and identical with the terms of the offer. The acceptance must be the acceptance of the thing proposed and must not introduce any new conditions or terms. It must be absolute and unqualified. If new terms or conditions are introduced, the acceptance becomes a fresh offer, which takes the place of the original offer. W offered some land to H for $1,000. H replied that he would give $950. W refused. Then H said that he would give $1,000, and W refused. In an action by H against W for specific performance, it was held that H's acceptance for

$950 constituted a refusal of W's offer, and amounted to a counter-proposal and that, under those circumstances, W could not be compelled to stand by his original offer.

So wherever there is a condition in the offer that condition must be performed by the acceptor or there is no agreement. Thus, in a leading case in the United States Supreme Court, A wrote to B offering to buy some flour of him and requiring him to reply by the cart which took the offer. B, thinking that he would save time, sent his answer by mail. It was held that A was entitled to refuse the flour because there had been no agreement, as B had not performed one of the conditions of the offer.

An offer unaccepted creates no rights and hence may be revoked at any time before acceptance is communicated. It may also be revoked by the expiration of the time which it prescribes for acceptance or by the expiration of a reasonable time, or by the death of either party before acceptance.

II-III.

Form and Consideration.

The evidence of the intention of parties to a contract is supplied by offer on the one side and acceptance on the other, but intention to make an agreement is not sufficient of itself to make a binding contract. American Law requires further evidence of this intention and this evidence is supplied in two ways, viz: by Form or by Consideration. The only Formal Contract is the contract under seal, but if the contract be not under seal then it requires a consideration to make it binding.[1]

Contracts not under seal are called simple contracts whether they be by word of mouth or in writing. At

Common Law all simple contracts were good by word of mouth, with the single exception of a Bill of Exchange, but by statutes beginning in the year 1677 many kinds of agreements are required to be in writing. The Statute of Frauds is the most important legislation of this kind. It was passed in the reign of Charles II and has been copied into the statutes of nearly every State in the Union. This statute by its most important sections, No. 4 and No. 7, enacts that NO ACTION SHALL BE BROUGHT, unless the agreement is in writing or there is a note or memorandum of the agreement in writing signed by the party sued, in the following six cases: (a) A promise by an executor to answer damages out of his own estate; (b) A promise to answer for the debt, default or miscarriage of another; (c) An agreement made in consideration of marriage; (d) A contract for the sale of land, or any interest in or concerning land; (e) An agreement not to be performed within a year from its making; (f) A contract for the sale of any goods, wares or merchandise for the price of $50.00 or upwards.

Consideration is shortly defined as a benefit to the promisor or a detriment to the promisee. It need not be money or even money value, it being sufficient that the promisor does or promises to do something which he has a right to do. All simple contracts, whether they are by word of mouth or in writing, require consideration to support them and if they do not have it the agreement is not enforceable in the Courts.

The adequacy of the consideration is immaterial. So long as the party gets what he contracts for, the Courts will not examine into the transaction in order to find out what its value is to him or whether it is at all proportionate to what he promised in return. They will not ask

nor will they permit the promisor to litigate the question whether the consideration benefits him or a third person or is of any substantial value to anyone. To do otherwise it is well said would be "the law making the bargain, instead of leaving the parties to make it." The slightest consideration then is sufficient to support the most onerous obligation.

In a well known case F asked permission of B to weigh his boilers, which B granted, and in consideration of which F promised to return them in as good condition as he received them. He did not do so and B sued him. F contended that the permission to weigh the boilers was neither a detriment to B or benefit to F and was, therefore, not a consideration to support his promise. But the Court said, "The defendant had some reason for wishing to weigh the boilers; and he could only do so by obtaining permission from the plaintiff, which permission he did obtain by promising to return them in good condition. We need not inquire *what* benefit he expected to receive."

A consideration is either executory or executed. An executed consideration is something done. An executed consideration is something promised. A, for example, pays B $50.00 for a barrel of sugar, which B is to deliver. Here A's consideration for B's promise to deliver the sugar is executed. But if A says to B, "I will pay you $5.00 when you deliver the sugar," here A's consideration is executory.

A contract must be certain, legal, and possible of performance. It must impose on the promisor some obligation. A promise to do something which the party is already bound to do, either by law or contract, is no consideration. If a Public Officer is obliged by law to furnish a copy of a document to any citizen applying for

it for $1.00, a promise to pay him more than the $1.00 is founded on no consideration, for the promisor receives nothing in return for his promise. So if a man refuses to carry out a contract he has made with another unless the other will pay him a higher sum than was promised, the new promise to pay more has no consideration to support it and is unenforceable.

A past consideration, that is the giving as consideration for a contract something which has been done before the contract was entered into, cannot as a general rule support the contract. If A says to B, I will pay you $5.00 a week if you will board my brother at your house and B furnishes the board, this furnishing of board is a good consideration for the promise to pay $5.00 a week. But if B without the request of A furnished the board to the brother, a subsequent promise by A, "I will pay you for boarding my brother," would be founded on a past consideration and would not be enforceable in the courts.

III.

Capacity.

There are certain persons whom the law regards either wholly or in part as incapable of contracting. This incapacity may arise through the following causes: (a) political status; (b) artificiality of existence; (c) infancy; (d) marriage, and (e) insanity or drunkenness.

(a) A sovereign state or government may make contracts and sue on them but it cannot be sued without its consent. Foreign States, Sovereigns and their representatives, such as ambassadors and ministers, cannot be sued in our Courts unless they submit themselves to their jurisdiction, but they may sue upon contracts if

they choose. An alien enemy, by which is meant a person who is the subject of a nation with which we are at war, cannot make a contract with one of our citizens or bring an action on a contract in our courts while war is proceeding, but their rights which were in existence prior to the war are only suspended during the hostilities and can be enforced when the war is ended.

A convict can neither contract nor sue upon a previous contract during the continuance of his conviction.

(b) A corporation is an artificial person having a legal entity created by statute. This legal entity is entirely apart from the members who compose it and its rights and liabilities differ from the individual rights and liabilities of its members. A corporation has a limited capacity to contract. It can only make those contracts which by its charter it is permitted to make, or such as are fairly incidental to the powers granted to it. All contracts made beyond its capacity are said to be *ultra vires* and are void. Being a corporate body it cannot contract personally and therefore must contract through an agent. It must also contract under its seal, except in matters of trifling importance, daily necessity, or great emergency.

(c) An infant in law means a person under twenty-one years of age. At common law all contracts made by an infant are voidable at his option. The word voidable in this connection may mean one of two things, viz.: valid till repudiated, or invalid till confirmed after full age. The class of contracts which are valid till repudiated consist of agreements involving a continuing obligation, as for example a partnership or a lease. These must be repudiated within a reasonable time after coming of age or they will bind the infant. But contracts for isolated actions, as agreements to buy property or to

pay for services or goods or the like, are not binding unless they are ratified after coming of age. To the general rule of non-liability of an infant on his contract there is one notable exception, namely, contracts for necessaries. These contracts the infant could never and cannot now repudiate. For such necessaries supplied to him he must pay a reasonable price. As to what are "necessaries" in any particular case, the Court determines in the first place, having regard to the circumstances, whether the goods can be reasonably taken to be necessaries. If they cannot, the jury is not asked the question. If the Court, however, thinks the question open, the Jury is asked whether they are in fact necessaries.

(d) At common law a married woman had few rights. Her marriage operated as a gift to the husband of all her personal and real property and the husband became liable for all her anti-nuptial contracts and debts. No contract made by her was binding on her (with a few exceptions); but by modern statutes in most of the States a married woman is now given power to contract and to bind herself to answer for those contracts out of her separate estate. As the husband is bound to supply his wife with necessaries, he is generally liable for contracts made by her for such things for the household unless he can show that he had sufficiently supplied her with such necessaries.

(e) Lunatics and drunkards are not liable on their contracts. A promise made by a lunatic or a drunkard if he is so incapable as not to know what he is about can be repudiated by him, but not by the other party. The contract is voidable only and may be enforced by the guardian of the lunatic or by the drunkard when he becomes sober. Where, however, necessaries are sold

and delivered to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

IV.

Consent.

There are circumstances which invalidate an agreement on the ground that there has been no real consent, viz.: (a) Mistake, (b) Fraud, (c) Misrepresentation, (d) Duress, and (e) Undue Influence.

(a) Mistake, when it appears at all, makes a contract void. Mistake operates in four classes of cases, viz.:

(1) Mistake as to the nature of the obligation;

(2) Mistake as to the person contracted with;

(3) Mistake as to the subject-matter of the contract, either as to its existence or its identity;

(4) Mistake of one party as to the intention of the other party, such mistake being known to the other party.

As a general rule mistake does not of itself void an agreement. If, however, the mistake is such as to prevent real consent the contract is void altogether for there is no real agreement. If there is real consent and a mistake occurs in writing down the agreement this does not affect the contract but can be rectified in a Court of Equity.

(1) A man who is illiterate or blind or who acts from misplaced confidence without negligence and signs a document of one sort, being told that it is a document of another sort, cannot be held on it. His mind did not accept the signature and therefore in the eye of the law he had not made the contract which the writing evidences.

(2) If a man contracts with A believing that he is contracting with B, A cannot hold him on the contract.

(3) If A and B make an agreement in regard to a thing which unknown to both is non-existent at the time of entering into the contract, the mistake goes to the root of the matter and avoids the contracts, for there can be no contract where there is no subject-matter. Thus, where A agrees to sell to B a certain horse which, unknown to both parties is dead, or a certain building which is burned down at the time of their making the agreement, there is no contract.

So where A agrees with B concerning one thing, thinking that B is referring to that, while B agrees with A concerning another thing and thinks that A refers to that other thing, there is no contract, for there is a mistake in the identity of the thing contracted for; the minds of the parties never really meet and there is no true consent. Thus, where A agreed to purchase from B a lot on Prospect Street and there were two streets of that name in the town, and A meant a lot on one of these streets and B a lot on the other, it was held that there was no agreement. So where a seller asked $165 and the buyer accepted, understanding him to say $65, it was held that there was no contract.

Mistake in motive or expectation does not, however, affect an agreement. Thus, if a man thinks a thing is worth more than it really is, that is not a legal mistake. If a person purchases a specific article, believing it will answer a particular purpose to which he intends to put it, and it fails to do so, he is bound just the same to pay for it, according to his agreement.

(4) If a person accepts an offer which he must have known expressed something which the offerer did not intend to express, the contract is void.

As to quality, there is a maxim of Common Law that "The buyer must look out for himself," which with a few exceptions is applicable to every case of this kind. But if the seller knows that the buyer understands his promise in a different sense from that which he, the seller, means, the contract is void.

(b) Fraud consists in a false representation of fact made by one party to the contract with a knowledge of its falsehood, or without an honest belief in its truth, with the intention that it shall deceive and be acted on, and which does in fact deceive the other party and induces the contract. Fraud if proved makes a contract voidable.

(c) Misrepresentation is a misstatement made innocently while in fraud it is made knowingly with intent to deceive. As a general rule misrepresentation does not avoid a contract in a Court of Law, but Courts of Equity very early took a different view and if the representation were untrue in fact, and had been material in inducing the contract, the Courts of Equity declined to decree specific performance to help a man "who, having obtained a beneficial contract by a statement which he now knows to be false, insists on keeping that contract," and might even direct the contract to be set aside.

(d) Duress consists in actual violence, or in threats to kill or imprison, or to do actual violence either to the party himself or to his wife, child, or parent, through the fear of which the party is forced to contract. But a threat of imprisonment is not duress unless the imprisonment would be unlawful. Contracts made under duress are voidable at the option of the party who has been placed under duress.

(e) Undue Influence exists where one party, through certain circumstances or conditions, is prevented from

resisting the will of the other. The Courts will presume the existence of Undue Influence in cases where the party benefited stands to the other in the position of parent or guardian, or of solicitor, or of medical attendant, or of spiritual adviser. But the principle applies not only to those cases but "to every case where influence is acquired and abused, where confidence is reposed and betrayed."

The presence of circumstances of this sort raises a presumption unfavorable to the honesty of the transaction, and throws on the party supporting the transaction the onus of rebutting the presumption. Contracts vitiated by undue influence are voidable at the option of the injured party, but the contract must be repudiated within a reasonable time after the undue influence has ceased.

V.

Legality.

There are certain things which the law forbids as the object of agreement and though all the requirements of the formation of contracts may have been fulfilled, the Courts will not enforce agreements entered into with such objects. These may be considered under three heads, viz.: (a) Contracts made in breach of a statute, (b) Contracts made in breach of some rule of the common law, and (c) Contracts contrary to public policy.

(a) A statute may interfere in two ways with the validity of a contract, viz.: (1) By absolute prohibition, in which case no doubt can arise as to the illegality of the contract; and (2) By the imposition of a penalty. In the latter case, if the penalty is intended for the protection of the public—e. g., if it is imposed to prevent the carrying on of a trade or business in a particular

fashion or under particular conditions—a contract going against the provisions of the statute will be void. But if the penalty is imposed, not in the interest of the public but for the security of the revenue only, then it is considered that the contract is not void, unless the statute expressly makes it illegal, in which case it is immaterial whether the statute has in view the protection of the revenue or any other object.

Among the contracts made illegal by statute are wagers, agreements for usury, contracts made on Sunday, and a few others.

(b) The contracts illegal at common law are those whose object is to commit a crime or to aid and abet in the commission of a crime, or to commit a civil wrong. Thus, agreements to libel a third person or to pay a sum of money to another if he will beat an enemy or will commit a fraud or a trespass on a third person are illegal and void.

(c) The largest number of agreements which are illegal are so because they are considered by the Courts as against public policy. Agreements which tender to injure the public service, as those whose object is to bribe or unduly influence a public officer in a duty or the appointment of a public officer or the freedom of elections; likewise agreements which obstruct public justice, as for example, those whose object is to deceive a Court or compound an offense against the law, are against public policy and void. So are agreements to facilitate divorce or separation between husband and wife, or to restrain or prevent marriage. So are agreements in derogation of parental rights, as for example, where a father agrees to give up the control of his children, or agreements to force a testator in the making of his will. Another large class of contracts void because

against public policy are contracts in restraint of trade. In the early Common Law such agreements were void in every case, but modern commerce and industry have somewhat modified the old law and it is now held that contracts for a partial restraint of trade are good, provided such restraint be reasonable in the opinion of the Court.

The effect of illegality on a contract is generally to make it void and a Court will neither enforce such an agreement at the suit of the party to whom the promise is made, nor will it after it has been performed set it aside. In other words, Courts of Law will not interfere to help either party, in accordance with the maxim "In pari delicto potior est conditio defendentis," which being freely translated means, "Of two rogues, it is better to be the defendant."

PART II.

Operation of Contracts.

The obligation arising from a contract is of a limited nature, and does not extend beyond the parties to the agreement. A contract cannot operate so as to confer rights or liabilities upon persons who are not parties to it. But although the positive obligation to perform the contract can bind none but the parties to it, there is an obligation of a negative character cast upon strangers not to injure the parties who have entered into a contract by maliciously interfering with and preventing its being carried out.

Third parties, however, may acquire rights and assume liabilities under a contract by being substituted for the original parties to the agreement. This is called "assignment." As a general rule a liability cannot be

assigned without the consent of the other party, for a person entering into a contract has a right to choose the one to whom he wishes to look for the performance of it. As to rights, however, the rule is different and the benefit of a contract may now be assigned so as to entitle the assignee to sue upon it in his own name. This, while not true at Common Law, is almost universally true now by reason of modern statutes permitting such assignments. The effect of these statutes is to give to the assignee of a debt or legal chose in action all legal rights and remedies. But—

(a) Notice must be given to the party to be charged.

(b) The title of the assignee dates from the notice.

(c) The assignee takes subject to equities.

The meaning of this last phrase is that the assignee takes no better title than the assignor had; in other words, he stands in the shoes of the assignor, and if the promisor has a defense against the assignor he may set it up against the assignee, except in the case of a negotiable instrument. It is a well known principle that the assignee or indorsee of a bill of exchange or promissory note may get a better title than his indorser had.

Rights and liabilities may also be assigned by operation of law quite independent of the acts of the parties. Instances of this are found in assignment by marriage, by bankruptcy, and by death.

PART III.

Interpretation of Contracts.

When difficulties arising out of a contract are submitted to the Courts for settlement the points which chiefly claim their attention relate to (a) how the terms

of the contract are proved and how far the written terms can be modified by oral evidence, and (b) what rules are to be applied for construing the meaning and effect of the agreement whose terms have thus been proved. It is for the jury to ascertain the circumstances under which the alleged contract was entered into, what was said or done, and what was the intention of the parties. On the other hand it is for the Judge to determine whether what the parties said and did amounted to a contract, and what is the effect of the agreement.

If an oral contract has been made neither of the parties shall be allowed to plead that he did not mean what he said or what he conveyed by his behavior. The same rule applies to written contracts. Where a contract is wholly in writing nothing as a general rule can be added or varied or subtracted by parol evidence, because "it would be contrary to the intention of the parties to admit any other evidence than the writing which they have agreed to, and accepted as expressing the contract between them." But oral evidence is always admissible to show that the contract, whether under seal or simply in writing, is an invalid one, owing to—

(1) Incapacity of one or both the parties; or

(2) Want of genuine consent; or

(3) Want of consideration; or

(4) Illegality of object; or

(5) Through the non-fulfilment of any of the necessary requirements for the formation of contracts.

(b) The construction of a contract in writing belongs to the Court who follow these general rules:

(1) Words are to be construed according to their ordinary meaning, but subject to inference of intention from the whole agreement.

(2) General words will be restricted to the particular matter in reference to which they are used.

(3) Words susceptible of two meanings shall be assigned that which will make the instrument valid.

(4) Words shall be construed strictly against the party using them.

(5) Exceptions shall be construed strictly.

PART IV.

Discharge of Contracts.

A contract may be discharged, that is, put an end to, in the followings ways: (a) By agreement; (b) By performance; (c) By impossibility of performance; (d) By operation of law, and (e) By breach.

(a) A contract may be discharged by express mutual agreement of the parties that they shall no longer be bound by it. This is called waiver or release. A contract may also be discharged by alteration in its terms, which alteration becomes a new agreement taking the place of the old one. Where a new party is, by agreement of all three, substituted for one of the original parties this is called Novation.

A contract may contain in itself the element of its own discharge, for example it may provide that it shall not bind the parties if the conditions subject to which it is made remain unfulfilled or if a certain specified event upon which it depends does not occur, or the discharge may depend on the option of one of the parties if it has been agreed that it shall be so.

(b) A contract may be discharged by performance but such performance must be in strict accordance with its terms. In the case of a sale of goods the seller does not perform the contract by delivering a larger or a

smaller quantity, or by delivering the goods mixed with other goods, whether the buyer be or be not able to separate them.

Where a promise is to deliver money then the contract is discharged by payment. A contract is also discharged by tender, which is an offer to deliver or to pay, coupled with the capacity to do so. In either case the person entitled to performance may refuse to accept tender, but the effect of this refusal differs with the nature of the tender. If, in a case of tender by delivery, the buyer refuses to accept the goods, the seller is discharged from the contract, and may either sue for breach or defend successfully an action in respect of it. But in the case of a debt, tender by the debtor does not discharge him, although it may be a good defence to an action by the creditor. In order that a plea of tender shall be successful in an action for breach, it is not enough that the money has been tendered and refused. The debtor must allege that he continues ready and willing to pay and must pay the money into Court.

(c) As a general rule a party is not discharged from a contract that he has made by reason of subsequent impossibility, because in making the contract he might have guarded himself against such accidents. A person who sells goods agreeing to deliver them at a certain time cannot plead that it was impossible for him to get them, nor can a person who agrees to do a certain work plead that on account of some unexpected calamity it has become extremely difficult or impossible for him to complete it. The law says to parties who are entering into contracts, "Don't promise what you can't perform." A man is not obliged to promise a dangerous or an unreasonable thing, but if he does so he must carry out his agreement. So if he wishes to protect himself from

the thing which he agrees to do turning out to be difficult or dangerous or unreasonable to do, he has full opportunity to so provide in his contract, and if he promises unconditionally he will be bound unconditionally. To this strict rule, however, there are three exceptions: (a) Where the impossibility is caused by a change in the law; (b) where the contract relates to a specific thing, and (c) personal contracts.

(a) If at the time the promise was made it was lawful to do the thing, but a subsequent statute makes it unlawful, then the promise is discharged. Thus, a covenant in the lease of a wooden building to rebuild the same in case of fire, was decided to be released by the subsequent passage of a municipal ordinance prohibiting the erection of wooden buildings in that locality.

(b) When the contract relates to a specific thing it is considered subject to the implied condition of the continued existence of the thing, so that if the thing perishes without the fault of either party the contract is at an end. Thus, where A agreed to let his hall to B for a public entertainment and before the date of the entertainment the hall was destroyed by an accidental fire, this was held to discharge both parties.

(c) Contracts for personal services are discharged by the death of the promisor or his incapacity through illness. Thus, if an eminent player contracts to perform at a concert, or an artist to paint a picture, if either is incapacitated by illness or death, this is a good defense, for no deputy could perform for him, nor in case of death could his executor.

(d) By the operation of certain rules of law certain contracts are discharged. This occurs in case of (1) Merger; (2) Alteration of written instrument; (3) Bankruptcy, and (4) Death.

(1) When a simple contract has been entered into and has been followed by a contract under seal between the same parties on the same subject-matter and embodying the same terms the simple contract is merged in the contract under seal. On the same principle a lower security is merged in a higher one.

(2) If a written contract be materially altered without the consent of all the parties to it it is discharged, but the alteration must have been made by a party to the contract or with his consent and the alteration must be a material one.

The loss of a written instrument does not affect the rights of the parties as long as it can be proved that the instrument did exist.

(3) When a bankrupt has obtained an Order of Discharge from the Court it releases him from all his debts provable under the bankruptcy act.

(e) If one of the parties breaks the contract the other party has always a right of action against him for damages, and if the contract be capable of specific performance, a right to obtain a decree for specific performance. But it is not in every case that breach will discharge the party injured, that is to say, will entitle him to treat the legal relations arising from the contract as having come to an end. A contract may be broken in three ways, viz.: By the person who is to perform refusing to perform, or by his making performance impossible, or by his simply failing to perform. If he refuses to perform the other party may bring an action at once without waiting for the time to arrive when performance is to take place, and the same is so when he makes it impossible that he will perform. Thus, in one case the defendant engaged the plaintiff as a courier at $100 a month, the service beginning on 1st of June. Before

that day he informed the plaintiff that he should not require him, and before that day the plaintiff brought suit. It was held that the plaintiff's right of action accrued immediately on the receipt of the explicit renunciation, and that he was not bound to wait till June 1st. In another case A promised to marry B on the 10th of May and on the 1st of April he married C. It was held that A having made it impossible for him to perform his contract, B could immediately bring her action and need not wait until the 10th of May.

Where the party simply fails to carry out what he agreed to do and yet the contract is not thereby made incapable of performance and he does not decline to go on, the question as to whether the other is entitled to treat himself as discharged or must content himself with performing on his side and claiming damages for the breach, is one which depends on whether the promises were independent or dependent. If they were independent non-performance by one will not release the other. The Courts, however, when each promise forms the consideration for the other will construe the promises to be dependent, unless it is clear that the parties intended them to be independent.

Conclusion.

Every breach of a contract entitles the injured party to damages, though they be but nominal in amount and sometimes a Court of Equity will decree specific performance, that is compel the party to carry out his agreement, but the right of action for damages and the cases where specific performance will be granted are regulated by the Law of Procedure, which is beyond the scope of my subject.